(27)

Nos. 89 and 90

Supreme Court of the United States

OCTOBER TERM, 1944

REPPLIER COAL COMPANY,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF AMICI CURIAE

F. G. Davidson, Jr.,
Theodore L. Harrison,
J. Donald Rawlings,
W. A. Sutherland,
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MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE

The undersigned respectfully move this Honorable Court for leave to file the annexed brief as amici curiae in the above entitled cause.

Respectfully submitted,

F. G. Davidson, Jr.,
Theodore L. Harrison,
J. Donald Rawlings,
W. A. Sutherland,
Amici Curiae.

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BRIEF FOR AMICI CURIAE

This brief is submitted by the undersigned in support of the petition for certiorari herein to the extent that the petition seeks the review of one issue in which the undersigned are interested on behalf of their several clients. The fact that this brief does not support the petitioner's request that other issues be reviewed is not intended in any way to reflect upon the merits of the other issues as to which clients of the undersigned have no interest.

The petition herein should be granted for the reason that the determination of the Court below is, we submit, contrary to recent decisions of this Court.

From the petition herein it appears that the Tax Court found that the allowable rate of depreciation during petitioner's tax years 1930 to 1934 was substantially less than the amount reported on petitioner's returns for such years. Further, the Tax Court found that petitioner's depreciation base should be adjusted under Section 113 (b)(1)(B) of the

statute by restoring to the petitioner's depreciation base the excessive depreciation [1] reported on the return.

The Circuit Court of Appeals reversed the Tax Court on the authority of this Court's decision in *Virginian Hotel Corp.* v. *Helvering,* 319 U. S. 523 (October Term, 1942, No. 766). In the petition for certiorari herein this Court is requested to review that determination of the Court below.

We urge that the Court grant the petition to review that determination of the Court below for the following reasons:

(1) The decision of the Court below reversing the Tax Court is contrary to this Court's decision in *Dobson* v. *Commissioner,* 320 U. S. 489 (October Term, 1943, No. 266) holding that the determination of the Tax Court on questions of this character should not be disturbed; and

(2) The decision of this Court in *Virginian Hotel Corp.* v. *Helvering,* supra, has been overruled by the decision of this Court in *Dobson* v. *Commissioner,* 320 U. S. 489 (October Term, 1943, No. 266). If this Court did not intend to overrule the *Virginian Hotel* decision in *Dobson* v. *Commissioner,* a most undesirable state of confusion has been created in this very important field of Federal taxation as a result of the decisions by this Court in the *Dobson* case and in *Douglas* v. *Commissioner,* (October Term, 1943, Nos. 130-133).

In the case at bar the Tax Court found that the proper rate of depreciation was substantially less than that used by the taxpayer in its returns for the years 1930-1934. The Tax Court further found that the depreciation reported on the return in excess of that properly allowable should be restored to the taxpayer's basis for computing depreciation in later years to the extent that such excess had not served to reduce the petitioner's taxes in the years mentioned.

[1] Whenever the term "excessive depreciation" is used herein, it is to be understood that reference is made only to so much of the depreciation as was in excess of the proper amount and did not serve to reduce taxable income.

Under the unanimous decision of this Court in the *Dobson* case, this determination by the Tax Court in the case at bar was final and should not have been disturbed by the Circuit Court of Appeals.

(1) On the issue as to whether the Circuit Court of Appeals should consider the determination of the Tax Court binding, there is no sound basis upon which this case can be distinguished from the *Dobson* case. The *very same* section of the Code is involved in each, namely, Section 113 (b)(1) which, so far as here material, reads:

> "SEC. 113. ADJUSTED BASIS FOR DETERMINING GAIN OR LOSS."
>
> * * * * * * *
>
> (b) *Adjusted Basis.* The adjusted basis for determining the gain or loss from the sale or other disposition of property, whenever acquired, shall be the basis determined under subsection (a), adjusted as hereinafter provided.
>
> (1) General Rule. Proper adjustment in respect of the property shall in all cases be made—
>
> (A) For expenditures, receipts, losses, or other items, properly chargeable to capital account, * * *;
>
> (B) * * * for exhaustion, wear and tear, obsolescence, amortization and depletion, to the extent allowed * * *;

In the *Dobson* case, this Court held that the question as to what was a "proper adjustment" under (A) of the section was the character of question on which the Tax Court's determination was final. Obviously, the question as to what was a "proper adjustment" under (B) of the section is a question of the same character on which the Tax Court's determination should also be final. This Court unanimously concluded in the *Dobson* case that the Circuit Court of Appeals erred in substituting its judgment for that of the Tax Court. It clearly follows that the Court below in the case at bar also erred in reversing the Tax Court on this issue.

Let there be no doubt that the *Dobson* situation and the situation in the case at bar involve not only the same section of the law but also involve indistinguishable principles:

(a) In the *Dobson* case, the taxpayer had written off the difference between what he paid for the securities and what he sold them for. In the case at bar, the taxpayer had written off depreciation.

(b) In each case it developed that the amount written off was excessive.

(c) In each case the excessive amount written off and in issue did not reduce taxable income in the year the deduction was reported.

(d) In each case the Tax Court determined that under Section 113 (b)(1), providing for "proper adjustment", no adjustment should be made for the excessive amount reported in prior years where such excessive amounts did not reduce the prior years' taxes.

(e) In each case the Circuit Court of Appeals reversed the Tax Court.

The decision of this Court in the *Dobson* case that the Circuit Court of Appeals should not disturb the determination of the Tax Court in that case requires a similar decision in the case at bar.

(2) This Court's decision in the *Dobson* case establishes that the decision in the *Virginian Hotel* case, upon which the Court below based its decision, does not represent the present view of this Court.

In the *Virginian Hotel* case and in the *Dobson* case the government insisted before this Court that the decisions of the Circuit Courts of Appeals denying the tax benefit rule in bad debt cases were controlling. In the *Virginian Hotel* case the majority of the Court *accepted* the government's argument and relied upon the bad debt cases, citing *Helvering* v. *State-Planters Bank & Trust Co.*, 130 F. (2d)

44 (C. C. A. 4). In the *Dobson* case this Court *rejected* the government's argument and concluded that the bad debt cases had been erroneously decided, stating:

> "It is argued on behalf of the Commissioner that the Court should overrule the Board by applying to this question rules of law laid down in decisions on the analogous problem raised by recovery of bad debts charged off without tax benefit in prior years. The court below accepted the argument. However, instead of affording a reason for overruling the Tax Court, the history of the bad debt recovery question illustrates the mischief of overruling the Tax Court in matters of tax accounting. * * * A specific statutory exception was necessary in bad debt cases *only* because the courts reversed the Tax Court and established as matter of law a 'theoretically proper' rule which distorted the taxpayer's income. Congress would hardly expect the courts *to repeat the same error* in another class of cases, as we would do were we to affirm in this case." (Italics supplied.)

This Court in its decision in the *Dobson* case makes it perfectly clear that the situations in the *Virginian Hotel* and *Dobson* cases are analogous. In its opinion in the *Dobson* case this Court said in footnote 36 (320 U. S. at 506):

> "The question * * * arises not only in cases of recoveries of previously charged off bad debts and recoveries of the type we have here. It is also present in case of * * * adjustments of *depreciation* * * * and other similar situations." (Italics supplied.)

Since it is conceded that the question involved in the *Dobson* case and the question involved in the *Virginian Hotel* case are analogous to the question involved in the bad debt cases, it is certainly most incongruous to find absolutely opposite results. The only explanation is that the *Dobson* case is not only authority for the proposition that the bad debt cases were erroneously decided but is equally authority for the proposition that the depreciation cases—*Virginian Hotel* type cases—were erroneously decided.

The clear conflict between the *Virginian Hotel* and *Dobson* decisions of this Court has caused much uncertainty and confusion in the tax law which has not been moderated by this Court's decision in the *Douglas* case decided even more recently. In the *Douglas* case the same principle was involved in connection with depletion, but was involved as a secondary contention. Since the Court divided on the primary contention, and since one Justice did not participate and two other Justices apparently did not pass on the secondary question, the result has increased the confusion.

We respectfully submit that a most unusual state of conflict and confusion exists to which this Court should put an end at the earliest possible moment by granting the petition herein and reviewing this question.

Respectfully submitted,

F. G. Davidson, Jr.,
Theodore L. Harrison,
J. Donald Rawlings,
W. A. Sutherland,
Amici Curiae.

October, 1944.